NO. 45610-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

K.N.Z.; R.L.M., a minor; STEVE ZABRISKIE AND BETH-ANNE LOBEY; DEAN MANNING AND SHERRY FAWVER,

Appellants,

v.

FRED J. BEEMAN, an individual; DEBBY DILLING AND JERRY DILLING, wife and husband and the marital community composed thereof; and CHRIS BEEMAN, an individual,

Respondents.

BRIEF OF RESPONDENTS DEBBY DILLING AND JERRY DILLING

HALVERSON NORTHWEST LAW GROUP P.C.
Sara L. Watkins (WSBA #33656)
405 East Lincoln Avenue
P.O. Box 22550
Yakima, WA 98907
(509) 248-6030
swatkins@halversonnw.com

Attorneys for Respondents Debby Dilling and Jerry Dilling

pm 7/18/11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

Cases from Other Jurisdictions

State Rules

Restatements

Law Review Articles

I. INTRODUCTION

Judge David Gregerson's Amended Order Granting Certain Defendants' Motion for Summary Judgment should be upheld. Although the acts of Fred Beeman against K.N.Z. and R.L.M. were unacceptable, Debbie Dilling (hereinafter referred to as "Debbie") is not responsible for Fred Beeman's (hereinafter referred to as "Fred") criminal acts and should not be held liable for any damages alleged by Fred's victims. Debbie does not have a legal special relationship with Fred, had no duty to supervise Fred, and no duty to warn the victims or their parents of any criminal acts of Fred. As such, Judge Gregerson property determined that the case should be dismissed on Debbie Dilling's motion for summary judgment.

II. ASSIGNMENT OF ERROR

Appellants assign error to Judge Gregerson's order granting summary judgment in favor of defendant Debbie Dilling, which dismissed all claims against her.

III. STATEMENT OF THE CASE

Debbie Dilling is Fred Beeman's sister. CP 32. She is married to Jerry Dilling, and resided in Federal Way, Washington

from 1989 until January of 2003. CP 33. In January of 2003, Debbie moved to Bend, Oregon, but since she could not find employment there because her I.C.U. experience was not current, she got a job in Vancouver, Washington, in an I.C.U. at a local hospital working a few days a month, starting in approximately February of 2003. CP 33.

Prior to the February of 2003, Debbie rarely saw her brother Fred, and mostly saw him at family gatherings at their father's home in Grayland, Washington. CP 33. After February of 2003, until the fall of 2003, Debbie only saw Fred when she would stay at his apartment approximately eight days per month while she was working part-time at the hospital, during which time Debbie worked the night shift and Fred held down two jobs. CP 33.

Fred moved into Debbie and Fred's mother's Vancouver house full-time starting in the Fall of 2003, at which point Debbie stayed with Fred at their mother's house when she was working in Vancouver. CP 33. Even though Debbie and Fred both lived in the house together for approximately eight days per month, Debbie did not have any say over his activities in the house, and did not dictate

who he could have over as guests. CP 33. Debbie's typical day while working in Vancouver consists of working a twelve hour shift, from 6:00 p.m. to 8:00 a.m., at the hospital. CP 33. She then sleeps during the day and wakes up around 4:00 p.m. to get ready for work, makes herself something to eat, and then leaves again for work at 6:00 p.m., leaving about two hours per day of being awake at the house. CP 33-34.

Debbie knows plaintiff Steve Zabriskie, the father of K.N.Z., because Steve and her brother Fred were high school friends, and continued their friendship until May of 2011, but Debbie does not recall ever meeting Steve's daughter, K.N.Z. Debbie was not residing with Fred in 2000 when the inappropriate actions between Fred and K.N.Z. CP 33-34.

In 2001, Fred pled guilty to charges of contacting a minor for immoral purposes. CP 9. As part of his plea deal, he was required to go sex offender court-mandated counseling, which he completed. CP 34. Debbie did not know of any prior or subsequent issues surrounding her brother's sexual proclivities, and Fred did not

discuss these matters with her. CP 34. Fred's actions against K.N.Z. pre-date his 2001 conviction. CP 34, CP 2.

Chris Beeman is the half-brother of Debbie, sharing a father. CP 59.

In approximately late 2005 or early 2006 Debbie met Dean Manning and his daughter, R.L.M., at the Vancouver house. CP 34; CP 81 (Declaration of Dean Manning indicating he met defendants in approximately 2005). Debbie never saw R.L.M. alone at the Vancouver house. CP 34. Debbie never babysat R.L.M, or had any sort of supervision, authority, or control over her. CP 34. Other than occasionally seeing them at the Vancouver house, Debbie had little interaction with Dean Manning or R.L.M. CP 34.

Debbie had no knowledge of Fred's sexual tendencies, preferences, desires or proclivities other than the Fred's 2001 plea and had no indication based on her interactions with Fred that he would do the things that were alleged in 2001 or in 2011. CP 35.

Fred was not under any court-ordered guardianship or other similar order wherein Debbie was required to supervise or control him. CP 35. In fact, Fred was a fully-functioning adult and ran his

own business prior to the 2011 conviction. CP 35. Debbie never assumed responsibility for Fred, never exercised any control over him, never told him how to live his life, and never dictated his actions in the Vancouver house. CP 35.

The timeline is important in this case as there are two separate claims, one by K.N.Z. and one by R.L.M. The timeline is as follows:

2000: Action by Fred against K.N.Z. (CP 2)
- Debbie is living in Federal Way (CP 33)
- Debbie rarely sees Fred (CP 33)
- No knowledge of sexual tendencies

2001: Conviction on unrelated contacting a minor for immoral purposes charge (CP 9)
- Debbie is not living with Fred (CP 33)
- Actions by K.N.Z. occurred prior (CP 2)
- Doesn't know the Mannings yet (CP 34)

2003: Debbie starts staying with Fred 8 days per month for her job.
- Schedule allows her 2 hours of awake time (CP 33)
- Doesn't know the Mannings yet (CP 34)

2004: Action by Fred against R.L.M.
- Debbie is still working the same

schedule (CP 33)
- Doesn't know the Mannings yet (CP 34)

2005: Debbie meets the Mannings (CP 34)
- Only an acquaintance through Fred (CP 34)
- Both Dean Manning and Debbie give this year as the date they met (CP 34, CP 81)

2011: Debbie finds out about K.N.Z. and R.L.M. claims against Fred through Plaintiffs (CP 34-35)
- First time she hears about claims (CP 34)
- No subsequent issues after the 2001 conviction until the 2011 revelation (CP 34)

2012: Fred pleads guilty to amended charges.

No one was aware of Fred's plea to contacting a minor for immoral purposes (not any of the minors at issue in this matter) at the time Fred molested K.N.Z. in 2000, because the charges arose in 2001. Debbie did not know the Mannings at the time Fred molested R.L.M. CP 34; CP 81.

IV. ARGUMENT

A. Standard of Review

"The standard of review of an order of summary judgment is

de novo, and the appellate court performs the same inquiry as the trial court." *Washburn v. City of Federal Way,* 178 Wn.2d 732, 752, 310 P.3d 1275 (2013), *quoting Sheikh v. Choe,* 156 Wn.2d 441, 447, 128 P.3d 574 (2004). The existence of a duty is a question of law. *Id., citing Munich v. Skagit Emergency Commc'n Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012).

An appellate court makes the same inquiry as the trial court in reviews of summary judgment. *Robb v. City of Seattle,* 176 Wn.2d 427, 432, 295 P.3d 212 (2013). Affidavits and declarations must be made on personal knowledge and set forth facts which would be admissible in evidence. CR 56(e); *Discover Bank v. Bridges,* 154 Wn.App. 722, 726, 226 P.3d 191 (2010). Facts that would not be admissible at trial are disregarded in summary judgment proceedings. *Dunlap v. Wayne,* 105 Wn.2d 529, 535, 716 P.2d 842 (1986). "The facts and *reasonable* inferences from the facts are considered in the light most favorable to the nonmoving party." *Id., citing Taggart v. State,* 118 Wn.2d 195, 199, 822 P.2d 243 (1992)(emphasis added). "A summary judgment motion will not be denied on the basis of an unreasonable inference." *Marshall v. AC*

& S Inc., 56 Wn.App. 181, 184, 782 P.2d 1107 (1989), *citing Scott v. Blanchet High Sch.,* 50 Wn.App. 37, 47, 747 P.2d 1124 (1987), *rev. denied,* 110 Wn.2d 1016 (1988).

> Mere allegations or conclusory statements of facts unsupported by evidence do not sufficiently establish such a genuine issue. In addition, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value."

Discover Bank v. Bridges, 154 Wn.App. 722, 727, 226 P.3d 191 (2010), *quoting Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wn.2d 1, 13, 721 P.2d 1 (1986)(internal citations omitted).

> Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960), *quoting Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)(italics added by *Preston* Court).

It should be noted that Debbie objected to and moved to strike numerous portions of the Declarations of the Appellants and

Appellants' counsel pursuant to CR 56(e). CP 275-279. Those motions were not directly determined by Judge Gregerson. One of the objections came when Dean Manning attempted to change his testimony through a subsequent declaration contradicting the first. In Dean Manning's first Declaration, submitted with the response materials, he states: "I met the defendants in approximately 2005." CP 81. The Declaration was sworn to be true and correct under penalty of perjury. CP 82. Dean Manning then, on the day of the summary judgment hearing, filed a Supplemental Declaration which states: "I met all of the defendants prior to Fred Beeman's molestation of my daughter. . . . I met Debbie Dilling and Chris Beeman at approximately the same time I met Fred Beeman." CP 291. The amended declaration does not give any dates, years or times. CP 291. The second declaration was objected to at the hearing, along with various hearsay statements and irrelevant and prejudicial information provided by the Appellants. No determination was made by Judge Gregerson as to these issues.

In *Marshall v. AC & S, Inc.,* 56 Wn.App. 181, 782 P.2d 1107 (1989), the plaintiff first provided an affidavit stating he knew of his

exposure to asbestos in 1982. However, that put his claim outside of the statute of limitations, so he filed a second affidavit saying that he believed that his first doctor's visit occurred in 1983. Other evidence supported the 1982 date. The court stated: "When a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Marshall, supra,* at 185. Here, Dean Manning's first declaration was clear that he met Debbie Dilling in 2005 (which was after the molestation of his daughter by Fred). He then, on the date of the summary judgment hearing, amended his declaration to say that he met Debbie Dilling in approximately 2004. His inconsistent statements should not provide the basis for a finding of an issue of material fact. No inadmissible evidence should be used to determine the outcome of this matter.

B. The trial court properly granted summary judgment to Debbie because there is no issue of material fact that would indicate she had a duty to any of the Appellants.

Appellants alleged three causes of action against Debbie, all of which were properly denied on summary judgment by Judge Gregerson. Each of the allegations against Debbie requires Appellants to prove that there was a legal special relationship in place. Appellants can not so prove, and summary judgment, therefore, should be upheld.

1. The court properly granted summary judgment because Debbie Dilling had no special relationship with Fred Beeman or any of the Appellants, and therefore had no duty to them.

Appellants allege that Debbie had a duty to supervise Fred, a duty to warn the Appellants of Fred's sexual proclivities, and a duty to protect the Appellants. Appellants further allege that those duties were breached, causing them damage. Washington courts have looked to the Restatement (2^{nd}) of Torts in reaching decisions on whether a duty is owed to a third party relating to the conduct of another.

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (2nd) of Torts, § 315 (1965); *Terrell C. v. State Dept. of Social and Health Services,* 120 Wn.App. 20, 27, 84 P.3d 899 (2004). The Restatement outlines special relationships as those in which one person can control the conduct of another—jailers, prison wardens, and teachers; and those persons who control premises—innkeepers, and common carriers. *See Restatement of Torts,* § 315-320; *Nivens v. 7-11 Hoagy's Corner,* 83 Wn.App. 33, 54, 920 P.2d 241 (1996). There is no statutory or common law duty providing that a sister and brother have a "special relationship." *See Hansra v. Magana,* 7 Cal.App.4th 630, 644, 9 Cal.Rptr.2d 216 (1992)(there is not a "special relationship" per se between siblings or parents and children).

Special relationships may arise when there is an affirmative act taken by a person which is the proximate cause of the others'

damages. *Robb, supra,* at 433. However, "[c]riminal conduct is generally unforeseeable." *Washburn, supra,* at 757, *citing Nivens v. 7-11 Hoagy's Corner,* 133 Wn.2d 192, 205 n.3, 943 P.2d 286 (1997). The *Robb* Court cites to comment e of the Restatement to justify this exception to the general rule:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; *or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.*

Robb, supra, at 434, *quoting Restatement (2nd) Torts,* § 302B, comment e (emphasis added by the *Robb* court).

The *Robb* court determined that there must be misfeasance to instill a duty upon someone with regards to third party criminal conduct. "The relevant provision of *Restatement* § 302B comment e requires an affirmative act which creates or exposes another to a situation of peril. Foreseeability alone is an insufficient basis for imposing a duty." *Id.* at 435. In *Robb*, officers were called out to

investigate a threatened suicide. *Id.* at 431. Two days later, officers were advised the same suicidal person had stolen a car and was reported to have "shotguns under his bed." *Id.* at 431. Five days after that, officers stopped the same suspect on suspicion of burglary. *Id.* at 430. During the investigation, officers learned that a neighbor saw the suspect throw several shotgun shells on the ground before the officers arrived. *Id.* at 430. Officers saw shotgun shells on the ground during the investigation but did not pick them up because they did not see a connection between the shells and the reported burglary. *Id.* at 430. Officers released the suspect and minutes later a witness reported that the suspect returned to the scene and picked up the shotgun shells. *Id.* at 430. Later that evening the suspect shot a passing vehicle's driver, who was unrelated to any of the crimes or the suspect, with a shotgun. *Id.* at 430.

The victim's family alleged that the officers had a duty to protect citizens from the criminal acts of a third party when officers failed to pick up bullets on the ground during a *Terry* stop where the bullets were later used by the suspect to shoot a third party. *Id.* at 433. The court disagreed, finding that the officers did not increase

the danger to the victim in any way. In making that determination, the court distinguished misfeasance from nonfeasance stating:

> Misfeasance necessarily entails the creation of a new risk of harm to the plaintiff. On the other hand, through nonfeasance, the risk is merely made no worse. Nonfeasance consists of passive inaction or failure to take steps to protect others from harm

Id. at 437 (internal citations and quotations omitted). The court found that the officers "failed to remove a risk" but did not take any affirmative steps—the failure to pick up the shotgun shells was an omission and not an affirmative act by the officers. *Id.* at 438.

> The outcome of this case is dictated by the basic tort principles. In order to properly separate conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance. To label the conduct here as affirmative, danger-creating conduct would threaten this distinction, leading to an unpredictable and unprecedented expansion of § 302B liability.
>
> . . .
>
> [W]e hold that such a duty arises outside the context of a special relationship only where the actor's conduct constitutes misfeasance. Mere nonfeasance is insufficient to impose a duty on law enforcement to protect others from the criminal actions of third parties.

Id. at 439.

The more recent case of *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013), upheld the concept that an affirmative act is necessary to impart a special relationship upon someone that instills in them a duty to guard against another's criminal conduct. *Id.*, at 761. In *Washburn*, a Federal Way police officer was charged with delivering an anti-harassment no contact order to the victim's significant other. The victim filled out the Law Enforcement Information Sheet indicating that the significant other had a propensity for violence, did not know that the order was entered, and lived in the home. *Id.*, at 739. It also indicated that the significant other needed an interpreter and that the significant other did not know that he would be forced out of the house. *Id.*, at 739.

The Federal Way officer who served the order did not bring an interpreter with him. *Id.*, at 740. When he served the order, he saw the victim in the background inside the home. *Id.*, at 740. He did not interact with her or inquire as to her safety, he merely confirmed the identity of the significant other and served him with the paperwork. *Id.*, at 740. This left the victim in the home with the person on whom she served a no-contact order. She was left to

explain the order, since no interpreter was provided, and explain that it meant he was kicked out of the house. *Id.*, at 740. Ultimately, the significant other returned to the home and attacked the victim with a knife. The victim died of her wounds. *Id.*, at 740.

The court stated that "criminal conduct is, however, not unforeseeable per se." *Id.*, at 757. The court distinguished the facts in *Washburn* from the *Robb* case, stating that the Federal Way officer in fact had a duty to the victim. One of the facts was that the officer knew that the significant other would act violently because of the Law Enforcement Information Sheet filled out by the victim at the time the order was obtained (two days prior to service). *Id.* at 759. Second, the officer knew that he was serving the order at the significant other's house and when he served the order, he saw the victim in the background. *Id.* at 760. The court stated:

> [The Officer] should have realized that. . . he had created a new and very real risk to [the victim's] safety based on [the significant other's] likely violent response to the anti-harassment order and his access to [the victim].

Id. at 760.

The City argued that the case involved nonfeasance because the officer just walked away and omitted to do anything to ensure the safety of the victim. *Id.* at 760. The Court disagreed, and determined that the officer's actions actually were an act of misfeasance because he "served the antiharassment order improperly." *Id.* at 761. His service of the order was an improper act that put the victim in direct proximity to a dangerous situation that the officer knew was a possibility. The officer saw the two people together in the home, knew that the significant other would react violently, and left the scene without speaking with the victim, knowing she would be left alone in the home.

Appellants point to *Parrilla v. King County* to support their argument that Debbie had a duty to the Appellants, and therefore summary judgment was inappropriate. The *Parrilla* court, however, used the same standard—requiring misfeasance rather than nonfeasance—as both *Robb* and *Washburn*. *Parrilla v. King County,* 138 Wn.App. 427, 430, 157 P.3d 879 (2007). In *Parrilla,* a county bus driver pulled over his bus and demanded that everyone get off because there was an altercation between some passengers.

Id. at 430. The driver also exited the bus, but left the keys in the ignition and the engine running with one passenger still on board. *Id.* at 431. The driver re-entered the bus to approach the remaining passenger. That passenger exhibited strange behavior, including talking to someone who was not there, yelling and striking the bus windows with his fists. *Id.* at 431. The driver observed this behavior for a few minutes and then left the bus for a second time, with the keys in the ignition and the engine running, leaving the passenger on the bus alone. *Id.* at 431. The passenger then took the driver's seat, drove the bus and crashed into a number of vehicles, including the victim's. *Id.* at 431.

The court found that "King County owed Parrilla a duty to guard against [the passenger's] criminal conduct because the driver's actions exposed the Parrillas to a recognizable high degree of risk of harm through that misconduct, which a reasonable person would have taken into account." *Id.* at 433. The court found that the bus driver took an affirmative at by exiting the bus while the engine was running and having a visibly erratic passenger still onboard, alone. *Id.* at 433. The bus driver's affirmative act "exposed the Parrillas to

a recognizable high degree of risk of harm from misconduct" by the passenger. *Id.* at 433.

It should be noted that the *Parrilla, Robb* and *Washburn* decisions all involved questions of tort liability against a municipal corporation, not an individual. Courts found a duty where the cases involved an egregious affirmative act. The *Parrilla* case involved a bus driver who left his bus running with the keys in the ignition while a passenger exhibiting erratic behavior was left unattended. In *Washburn*, officers served a no-contact order on a man who was known to be violent and did so while the victim was in the house, without taking steps to ensure the victim's safety. The case at hand, however, is more like the *Robb* case, in that Debbie did not take an affirmative act, and did not make the situation any worse for the Appellants than it already was. Debbie only stayed at Fred's house a few nights per month. She rarely interacted with anyone while she was there. There is no evidence that she personally invited the Appellants to the house or put the Appellants in the situation they found themselves in—alone with Fred. There is no evidence that the children were in her care or charge at any time, that she baby-sat

them or that she had any control over the Appellants, the children or Fred.

Appellants also point to a California case to support their claim that Debbie had a duty to the children. Appellants cite to *Pamela L. v. Richard Farmer*, 112 Cal.App.3d 206, 169 Cal.Rptr. 282 (1980), but that case is distinguishable just like the *Washburn* case is distinguishable—there were affirmative acts involved. In *Pamela L.*, the victims alleged that Richard Farmer's wife "encouraged the parents of plaintiffs...to permit these children to go onto her premises by telling said parents it was perfectly safe to permit their girls to go to her premises to swim when she wasn't there because ... her husband would be there and the children would be perfectly safe...." *Id.* at 209. The court distinguished misfeasance from nonfeasance and determined that Richard Farmer's wife did not engage in mere nonfeasance, but instead took affirmative acts of encouraging and inviting the children to the swimming pool, and told parents of those children that her pool and home were safe when she was not there. "By encouraging and inviting the children to be alone with Richard under circumstances

where he would have peculiar opportunity and temptation to commit such misconduct, respondent could be held to have unreasonably exposed the children to harm." *Id.* at 210.

The *Farmer* case is distinguishable factually from the case at hand. There is no allegation or evidence that Debbie encouraged the children to come over to Fred's house. There is no allegation or evidence that she invited any of the Appellants over to Fred's house. There are no allegations that she assured the Appellants that their children would be safe. Debbie merely stayed at the house for eight days a month as a place to sleep while she was working in the hospital. There are no allegations she did any entertaining, acted as if she owned the house, had any interaction with the children or Appellants to encourage them to come over to visit, or otherwise took any affirmative steps or acts to get the children to Fred's house. Unlike the *Pamela L.* case, where Richard Farmer's wife reached out to the children to invite them into her home while she was gone, Debbie rarely interacted with the children or their parents as she was either at work or asleep when she stayed at the Vancouver house.

An affirmative act by Debbie would be necessary before the court could consider whether she owed a duty to the minor plaintiffs. Debbie is being sued for her inaction, or nonfeasance. "Misfeasance involves active misconduct resulting in positive injury to others." *Robb, supra,* at 437, *citing The Moral Duty to Aid Others as a Basis of Tort Liability,* 56 U. PA. L. REV. 217, 219 (1908); *see also Gazija v. Nicholas Jerns Co.,* 86 Wn.2d 215, 217-18, 543 P.2d 338 (1975). Debbie's actions, which included staying at the same house, occasionally socializing with the Mannings, and being Fred's sister are not affirmative actions, and not misfeasance. "Nonfeasance consists of a passive inaction or failure to take steps to protect others from harm." *Robb, supra,* at 437, *quoting Lewis v. Krussel,* 101 Wn.App. 178, 184, 2 P.3d 486 (2000)(internal quotations omitted). Debbie had no notice that Fred would do any of the things he did, did not stay with Fred or have significant interactions with Fred in 2000, and did not know the Mannings until after Fred molested their daughter. There is no evidence in the record that Debbie did any affirmative act, or provided anything in addition to what the Zabriskies and Mannings were providing as far as access to Fred

Beeman, that would rise to the level of misfeasance. Without facts supporting a claim of misfeasance, a special relationship is necessary to move forward with Plaintiffs' claims.

Appellants contend that Debbie was sent by her mother to watch over Fred, which creates a duty. Contrary to the briefing of Appellants, there is no admissible evidence that Debbie was sent by her mother to watch over Fred as Appellants state an abundant amount of times in their briefing. Their claim is based on a statement alleged to have been made by Chris Beeman. Specifically, Dean Manning states in his first declaration: "He [meaning Chris Beeman] said that "we," which I took to mean he and his sister, had been sent by their mother to Vancouver to keep watch over Fred." CP 82. The statement did not indicate Debbie was sent to watch over Fred, or even reference Debbie, or use the word "sister." CP 5. Dean Manning's declaration is based on pure speculation, inadmissible hearsay evidence and conjecture, none of which can be used to create an issue of material fact in a summary judgment procedure. *Miller v. Likins*, 109 Wn.App. 140, 145, 34 P.3d 835 (2001).

Debbie did not undertake to watch over Fred—she was barely at the home, and only saw him at most two hours per day when she was there. The facts presented do not rise to the level of someone who affirmatively undertakes to oversee or watch someone, the facts indicate Debbie used the house when she was working in Vancouver eight days per month, then she went back to her home in Bend, Oregon. These are not the actions of someone who has undertaken a responsibility to supervise another adult, they are the actions of a temporary house guest. There was no affirmative action by Debbie which would rise to the level that would create a duty to warn Appellants of Fred's prior conviction.

2. The court properly granted summary judgment because Debbie had no duty to supervise Fred Beeman.

Debbie had no control over Fred and there are no allegations that she ever controlled his life or indicated to others that she had any control over his actions. Debbie, from 1989 to January of 2003, lived in Federal Way, Washington, with her husband. The majority of contact Debbie had with Fred during this time came at family get-

togethers during the holidays at their father's home in Grayland. It wasn't until February of 2003 (approximately three years after the allegations of K.N.Z. against Fred), when Debbie started staying with Fred for approximately eight days per month. Even during those eight days per month, Debbie rarely saw Fred and had little time with him due to work schedules. In 2001, Fred pled to the charge of communicating with a minor for immoral purposes. Prior to the 2001 incident, Debbie had no knowledge or suspicion that Fred had sexual proclivities towards young children. Therefore, she could not have been sent to supervise him or have any knowledge that he might need supervision when he molested K.N.Z. *See Doe v. Corporation of the Catholic Bishop of Yakima,* 2014 WL 2721799, *14 (E.D. Wash. June 16, 2014—Slip Copy). Similarly, Debbie did not meet the Mannings until 2005, but the allegations by R.L.M. against Fred Beeman stem from 2004.

"By definition, the duty to supervise is limited to supervision of the activity over which the third person assumed responsibility. . . There is no duty to prevent a third party from causing physical injury to another." *Cox v. Malcolm*, 60 Wn.App. 894, 899, 808 P.2d 758

(1991). A duty will arise if there is a special relationship between the defendant and the victim, or the defendant and the third party causing harm. *Germain v. Pullman Baptist Church,* 96 Wn.App. 826, 836, 980 P.2d 809 (1999); *citing Niece v. Elmview Group Home,* 131 Wn.2d 39, 43, 929 P.2d 420 (1997).

Here there are no issues of material fact that Debbie never assumed responsibility over Fred. Fred had full control over his actions. Debbie is only his sister and stayed with him at their mother's Vancouver house during the eight days per month she worked at a local hospital. She never exercised any control over him, never instructed him as to his finances or life, and never dictated who he could have over or what he could do. Fred was his own man, and made his own decisions. Debbie was not required legally to supervise him and took no affirmative act indicated she accepted any responsibility over Fred or any supervisory authority over him. There are no allegations or evidence that Debbie was at any time charged with supervising the children, K.N.Z. or R.L.M. Debbie never was alone with the children, and never baby-sat them.

She had no duty to supervise Fred or the children, and Judge Gregerson's summary judgment determination should be upheld.

3. Since there is no special relationship between Debbie and Fred or between Debbie and the Appellants, the claim that Debbie failed to warn Appellants of Fred's proclivities was properly dismissed.

The duty to warn a third party must also arise from a special relationship. *See Petersen v. State*, 100 Wn.2d 421, 426-27, 671 P.2d 230 (1983). Here, there is no special relationship between Debbie and Fred which would require a duty to warn third persons of Fred's sexual proclivities. Similarly, there is no special relationship between Debbie and the Appellants which would require a duty to warn them of Fred's sexual proclivities.

Washington cases on duty to warn have generally focused on doctor-patient relationships. For example, the court determined that a doctor could be held liable for negligence when he failed to warn his patient, who was a bus driver, of the side effects of medication, which caused the patient to lose consciousness, crashing the bus and injuring the plaintiff. *See Kasier v. Suburban Transp. Sys.*, 65

Wn.2d 461, 398 P.2d 14 (1965). In *Petersen v. State,* the court held that a psychiatrist had a duty to take reasonable precautions to protect those who may be injured by his patient, who had drug-related mental problems. *Petersen, supra,* at 428. *See also Tarasoff v. The Regents of the University of California,* 17 Cal.3d 425, 551 P.2d 334 (1976).

In an analogous case out of California, *Hansra v. Magana,* 7 Cal.App.4th 630, 9 Cal.Repr.2d 216 (1992), the court evaluated whether a mother had a duty to warn her daughter-in-law of her son's violent tendencies and statement that he would not let his wife leave him. *Id.* at 644-645. The son murdered his wife, which gave rise to the claim of duty to warn. *Id.* Even though the son had made prior statements about not letting his wife leave him, his mother knew that he had access to weapons, and his mother knew he was prone to violent outbursts, the court found that there was no special relationship between the mother and her daughter-in-law which would require any duty to warn. *Id.* at 645.

In a case out of Kansas with similar facts as present in this claim, the court also found that a third party wife had no duty to

warn a minor of the sexual proclivities of her husband. *D.W. v. Bliss,* 279 Kan. 726, 112 P.3d 232 (2005). The court evaluated whether the wife of a criminal offender had a special relationship with the child victim which gave rise to a duty to warn. *Id.* at 234. The wife never witnessed any of the alleged criminal encounters, did not interact with the victim, and did not have any knowledge of her husband's sexual encounters with the victim. *Id.* at 234-236. She also testified that she did not have custody or control over her husband or over the victim. *Id.* at 236-37. The court determined that she had no special relationship with either the victim, or her husband, for the purposes of determining if she had a duty to warn the victim.

> We have, in all our special relationships/duty cases, followed the outlines of the Restatement, and to judicially create responsibility based on the marriage relationship would create a "slippery slope" of unlimited possibilities for family liability that would have no practical stopping point.

Id. at 240.

A Louisiana Court made a similar ruling in similar circumstances. In *Hackett v. Schmidt,* 630 So.2d 1324 (La.App.

1993), the plaintiffs brought claims against Walter Schmidt and his wife (who was related to the plaintiffs) based on Mr. Schmidt's alleged sexual molestation of their daughter. *Id.* at 1325-26. One of the claims against the wife was that she breached her duty to warn them about her husband's sexual tendencies. *Id.* at 1326. The wife did not deny that she knew of her husband's sexual tendencies, however her husband had gone through counseling for the problem and there had not been any incidents in over a decade. *Id.* at 1328. The plaintiffs also had knowledge of Mr. Schmidt's tendencies. *Id.* at 1328. Based on these facts, the court determined that the wife had no duty to warn the parents of her husband's sexual tendencies. *Id.* at 1328.

Finally, in *Eric J. v. Betty M.*, 76 Cal.App.4th 715 (1999), the California appellate court evaluated similar facts as the case at hand, and found that there was no duty to warn the victim's parents of prior known sexual tendencies. *See id.* Robert M. molested his girlfriend's eight year old son, and she sued Robert's parents for negligence for failure to warn her of his prior convictions for similar bad acts. *See id.* Robert had previously been convicted of

"annoying a minor" and "molesting a 10 year old boy." *Id.* at 717-18. He was out on parole and living with his family when he met his girlfriend and her eight year old son. *Id.* at 717. When he brought his girlfriend and her son to meet his family, his family did not mention his prior convictions, and neither had he. *Id.* at 718. He molested his girlfriend's son and was convicted of child molestation, after which his (then ex) girlfriend sued Robert's family for negligence for not warning her of his convictions. *Id.* at 718. The court stated: "Absent a 'special relationship' one cannot be held liable for mere nonfeasance. . . ." *Id.* at 727. The court held that Robert's family could not be held liable because it had no special relationship with Robert or the victim, and therefore no duty to warn the girlfriend of his prior bad acts. *See id.*

Here, there was no reason for Debbie Dilling to know of her brother's sexual proclivities prior to the 2001 conviction, and there is no allegation or evidence provided by the plaintiffs so indicating. Therefore, she could not have had any duties to the Zabriskies or K.N.Z. regarding the molestation of K.N.Z. in 2000.

After the 2001 conviction, Debbie Dilling believed that her brother had finished the court-mandated counseling, and knew of no other situations until these claims were brought up in 2011. Debbie believed that Fred successfully completed all the court-mandated sexual offender treatment imposed for his 2001 conviction. The treatment provided Fred an opportunity for rehabilitation—one of the goals of criminal sentencing. "Closely collateral to the protection of the public is the rehabilitation of the convicted criminal in the custodial setting. Modern criminology no longer views punishment as the imposition of a penalty, or the exaction of retribution. A sentence in a criminal case looks to the future. Its objections are to prevent repetition of crimes by the culprit and to dissuade others from perpetrating similar offenses." *State v. Wells,* 72 Wn.2d 492, 498, 433 P.2d 869 (1967). This is not pointed out to exonerate or attempt to justify Fred's actions, but to show that Debbie had reason to believe that after he had completed his court-mandated treatment, he was rehabilitated and would not be likely commit such crimes in the future. There was no foreseeable harm

because he completed treatment. There was no duty to warn R.L.M. or her parents of Fred's sexual proclivities.

4. Debbie also had no duty to prevent Fred's actions because she had no special relationship with Fred or the Appellants.

Debbie had no knowledge that Fred would molest K.N.Z. or R.L.M., and no special relationship with them that would require such a duty to prevent criminal acts of a third party. Pursuant to Section 319 of the Restatement of Torts: "one who takes charge of a third person whom he knows or should know is likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Terrell v. State Dept. of Social and Health Services,* 120 Wn.App. 20, 27, 84 P.3d 899 (2004). There must be authority to "take control" of the third person for this duty to arise. *Id.* at 28. Control is generally found in cases of corrections officers and offenders where the corrections officers have the ability to control the offenders' behaviors pursuant to statute and court orders. *Id.* at 28; *citing Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992).

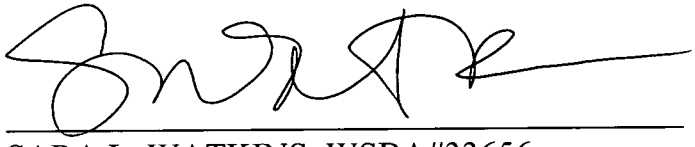
Similarly, the court has found that since social workers do not have control over the children under DSHS care, and do not supervise those children's' day-to-day activities, a social worker has no duty to prevent harm to the children in those homes. *Id.* at 28-29; (because there was no authority to change the educational placement of a child who was a ward of the state, there was no special relationship between DSHS and the child); *see also Stenger v. State,* 104 Wn.App. 393, 16 P.3d 655 (2001).

Debbie exercised no control over Fred and had no legal authority or responsibility to take control over him. There is no issue of material fact that Fred made his own decisions, lived on his own, and controlled his own life and finances. Debbie is his sister and stayed in the same house as he did for eight days per month, but asserted no control over him. She dictated nothing regarding his life. Debbie had no duty to prevent Fred's actions, ecause there are no issues of material fact that Debbie asserted no control over Fred, and was not given the authority or responsibility over the children. No special relationships existed. The claims that Debbie had a duty to prevent Fred's actions were properly dismissed.

VI. CONCLUSION

The trial court, after hearing extensive argument and reviewing extensive briefing and documents, determined that Debbie Dilling had no legal duty toward the plaintiffs or to supervise or prevent the actions of Fred Beeman. There is no evidence or allegation that Debbie should have known about Fred Beeman's sexual proclivities at the time K.N.Z. was molested. There is no evidence that Debbie exercised or attempted to exercise any control or supervision over Fred Beeman. No allegations or evidence indicate that Debbie had a special relationship with Fred Beeman or the plaintiffs. The trial court's order granting summary judgment and dismissing the claims against Debbie Dilling was proper and should be upheld.

RESPECTFULLY SUBMITTED this 16 day of July, 2014.



SARA L. WATKINS, WSBA#33656
Halverson Northwest P.C.
Attorneys for Respondents Debbie Dilling
and Jerry Dilling

CERTIFICATE OF SERVICE

I certify that I caused the foregoing BRIEF OF RESPONDENTS DEBBY DILLING AND JERRY DILLING to be served on the following:

Stephen G. Leatham
Heurlin, Potter, Jahn, Leatham
Holtmann & Stoker, P.S.
211 E. McLoughlin Blvd., Suite 100
P.O. Box 611
Vancouver, WA 98666-0611
Attorney for Appellants

Mr. Thomas J. Foley
Attorney at Law
P.O. Box 609
Vancouver, WA 98666-0609
Attorney for Respondent Chris Beeman

Mr. Fred J. Beeman
DOC#829839
Airway Heights Correction Center
P.O. Box 1899
Airway Heights, WA 99001-1899
Respondent Appearing Pro Se

by mailing, by U.S. Mail, First-Class postage prepaid, a true copy to the foregoing on the 16th day of July, 2014.

Lori J. Sauvé

LORI J. SAUVÉ, Legal Assistant
Halverson Northwest P.C.